Supreme Court, U.S.
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No. 00-1146

IN THE

Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Court held in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986), and in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), that the attorney's fee-shifting provision of the Clean Air Act shares a "common purpose" and should be interpreted "in the same manner" as similar provisions in the civil rights laws. 478 U.S. at 560. In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), this Court held that prevailing civil rights plaintiffs can obtain their attorney's fees, but prevailing defendants cannot charge their attorney's fees unless a plaintiff's lawsuit was "frivolous." In this case, the plaintiff's environmental enforcement claim was not frivolous, and the court of appeals below has now joined another circuit and several lower courts in applying the standard set forth in the two *Delaware Valley* decisions and in *Christiansburg* to several environmental laws. The question presented is:

Should the Court apply the two *Delaware Valley* decisions and *Christiansburg* to this case brought under the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001, *et seq.*, which is an environmental statute that has an attorney's fee-shifting provision similar to and modeled after that in the Clean Air Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF CASE 1

A. The Issue. 1

B. History of Proceedings. 2

REASONS FOR DENYING THE PETITION 6

I. THERE IS NO CONFLICT AMONG THE CIRCUITS, WHICH AGREE THAT *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG* APPLY TO ENVIRONMENTAL STATUTE FEE-SHIFTING PROVISIONS. 8

II. THE COURT HAS ALREADY SETTLED THIS ATTORNEY'S FEE ISSUE IN *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG* 9

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE COURT'S DECISIONS IN *DELAWARE VALLEY I & II, CHRISTIANSBURG* AND *FOGERTY*. 11

Contents

Page

IV. PETITIONER'S UNFOUNDED POLICY ARGUMENTS DO NOT WARRANT GRANTING CERTIORARI. 18

V. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEWING THE QUESTIONS PRESENTED BECAUSE THERE IS NO SUBJECT MATTER JURISDICTION. 20

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Adkins v. Briggs & Stratton Corp., 159 F.3d 306 (7th Cir. 1998) 17

Atlantic States Legal Found. v. Onodaga Dep't of Drainage, 899 F. Supp. 84 (N.D.N.Y. 1995) 9

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 20

Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988) ... 21

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) ..... *passim*

Consolidated Edison Co. v. Realty Inv. Assoc., 524 F. Supp. 150 (S.D.N.Y. 1981) 9

Equal Employment Opportunity Commission v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996) 14

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 7, 11, 12, 13, 17

General Tel. Co. v. Equal Employment Opportunity Commission, 446 U.S. 318 (1980) 14

Cited Authorities

Page

Lorillard v. Pons, 434 U.S. 575 (1978) 17

Marbled Murrelet v. Babbitt, 182 F.3d 1091 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) 4, 6, 7, 8, 9, 13

Morris-Smith v. Moulton Niguel Water Dist., Nos. 99-55350, 99-55865, 2000 U.S. App. Lexis 21502 (9th Cir., Aug. 21, 2000) 4, 9

National Wildlife Fed. v. Consumers Power Co., 729 F. Supp. 62 (W.D. Mich. 1989) 9

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986) ..... *passim*

Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987) ..... *passim*

Razore v. Tulalip Tribes, 66 F.3d 236 (9th Cir. 1995) 9

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) ... 14, 15

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 1, 3, 20, 21

Washington Wilderness Coalition v. Hecla Mining Co., Nos. 97-35565, 97-35754, CV-94-00233-FVS, 1998 WL 515365 (9th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999) 4, 7, 9

Cited Authorities

Page

W.G. v. Senatore, 18 F.3d 60 (2d Cir. 1994) 21

Willy v. Coastal Corp., 503 U.S. 131 (1992) 21

Statutes:

17 U.S.C. § 501 13

17 U.S.C. § 505 ..... 12, 13

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1447(c) 21

28 U.S.C. § 1919 21

29 U.S.C. § 626 14

30 U.S.C. § 1270(d) 16

33 U.S.C. § 1365(d) 7

42 U.S.C. § 1983 21

42 U.S.C. § 1988 ..... 2, 10, 11, 21

42 U.S.C. § 2000e-5(f)(1) 14

42 U.S.C. § 2000e-5(k) 11

42 U.S.C. § 7604(d) 2, 6, 10, 15, 16

42 U.S.C. § 11001, *et seq.* i

Cited Authorities

	Page
42 U.S.C. § 11046	3
42 U.S.C. § 11046(f)	*passim*
42 U.S.C. § 12117(a)	14
Rules:	
Fed. R. Civ. P. 11	21
U.S. Sup. Ct. Rule 10	6, 9, 18, 20
U.S. Sup. Ct. Rule 10(a)	8
U.S. Sup. Ct. Rule 10(c)	9, 11
Other Authorities:	
40 C.F.R. § 355 App. A	2
118 Cong. Rec. 4941 (1972)	14
S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977)	16
S. Rep. No. 1196, 91st Cong., 2d Sess. 38-39 (1970)	16
Altschuler, Melvoin and Glasser, L.L.P., 1999 Independent Auditors' Report for Citizens for a Better Environment	5

Cited Authorities

Page

Dun & Bradstreet, Inc., U.S. Company Reports, The Steel Co. Business Background Report (2001) . . . 5

Judicial Business of the United States Courts, *www.uscourts.gov/news.html* 19

Luke C. Hester, *Environmental News*, *www.epa.gov/tri/tri98/press/r-65.pdf* (May 11, 2000) 3

STATEMENT OF JURISDICTION

The judgment of the court of appeals, entered on October 17, 2000, denied Petitioner's motion for attorney's fees under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f). Petitioner's App. 1a-20a. Petitioner attempts to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). However, there is no subject matter jurisdiction because EPCRA's fee-shifting provision itself does not independently confer jurisdiction, and the Court already determined that there is no jurisdiction over Respondent's underlying EPCRA claim. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

STATEMENT OF CASE

A. The Issue. This case involves no novel issues and no split among the circuits. The decision below was a proper adjudication and application of settled law governing the allocation of attorney's fees. Petitioner is a steel company that, as a defendant in the original proceedings, admittedly violated EPCRA for eight years. It now seeks to charge its attorney's fees against a grassroots citizens' organization plaintiff that brought a non-frivolous environmental enforcement action, which was ultimately dismissed for lack of standing. *See Steel Co.*, 523 U.S. at 109-10. The district court denied Petitioner's attorney's fee demand for lack of jurisdiction. On appeal, the United States Court of Appeals for the Seventh Circuit held that the Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council ("Delaware Valley I")*, 478 U.S. 546 (1986), and *Pennsylvania v. Delaware Valley Citizens' Council ("Delaware Valley II")*, 483 U.S. 711 (1987), and in *Christiansburg Garment Co. v. Equal Employment*

Opportunity Comm'n, 434 U.S. 412 (1978), are controlling, and they preclude awarding attorney's fees to Petitioner because the Respondent's claim was not frivolous. App. 3a-5a.

Christiansburg holds that, under § 1988, prevailing plaintiffs can recover their attorney's fees from defendants, but prevailing defendants can charge their fees only if the plaintiff's claim was "frivolous" or brought in "bad faith." 434 U.S. at 421. In *Delaware Valley I*, the Court held that "[g]iven the common purpose of both § 304(d) [the Clean Air Act's fee-shifting provision, 42 U.S.C. § 7604(d)] and § 1988 [the Civil Rights Act] to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." 478 U.S. at 560. The Court's follow-up decision in *Delaware Valley II* states that, in applying the fee-shifting provision of the Clean Air Act, "courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988." 483 U.S. at 713 n.1. This differential standard fulfills Congress' objective of encouraging citizen enforcement of the environmental and civil rights laws while protecting defendants from frivolous claims.

B. History of Proceedings. Petitioner Steel Company concedes that it violated EPCRA for eight years by failing to provide required "community right-to-know" annual reports that disclose the toxic chemicals stored and emitted by its steel plant in a Chicago neighborhood, including hundreds of thousands of pounds of hydrochloric acid, which is an extremely hazardous substance. *See* 40 C.F.R. § 355 App. A. The purpose of EPCRA is to "inform the public about the presence of hazardous toxic chemicals" and to encourage

reduction in toxic chemical hazards. *Steel Co.*, 523 U.S. at 86. Since 1988, EPCRA has helped to reduce toxic chemical emissions across the nation by 45%. *See* Luke C. Hester, *Environmental News* at *www.epa.gov/tri/tri98/press/r-65.pdf* (May 11, 2000).

Respondent Citizens for a Better Environment is a not-for-profit organization that uncovered Petitioner's environmental violations. Respondent filed a 60-day notice of intent to sue letter and, then, filed a lawsuit under EPCRA's citizen suit provision, 42 U.S.C. § 11046. This provision is "substantially similar" to citizen suit and fee-shifting provisions under almost all of the federal environmental laws. Pet. at 6; App. at 14a.

Because Petitioner had submitted the required toxic chemical disclosure information before the complaint was filed, the district court dismissed the original lawsuit. The Seventh Circuit reversed the district court and ruled in favor of Respondent. Petitioner raised, for the first time, the argument that Respondent lacked Article III standing, and certiorari was granted. The Solicitor General argued on behalf of Respondent, and fifteen state attorneys general supported Respondent's position. The Court reversed the Seventh Circuit and held that "respondent lacks [Article III] standing to maintain this suit, and . . . we and the lower courts lack jurisdiction to entertain it." *Steel Co.*, 523 U.S. at 100. The Court did not reach the merits of the case. *Id.*

Petitioner then moved for attorney's fees under the fee-shifting provision of EPRCA. 42 U.S.C. § 11046(f). Respondent objected on three grounds: (1) the lack of jurisdiction over the underlying EPCRA claim necessarily meant that there could be no jurisdiction over the fee motion;

(2) Petitioner was not a "prevailing party" for the purposes of EPCRA § 11046(f) because it won on solely jurisdictional grounds and not on the merits; and (3) *Delaware Valley I & II* and *Christiansburg* applied to EPCRA § 11046(f) and barred any attorney's fees because plaintiff's claim was not frivolous or brought in bad faith.

The district court agreed with Respondent's first argument and denied the fee motion for lack of jurisdiction. On appeal, the Seventh Circuit disagreed with the first and second arguments, but agreed with the third and, therefore, denied the motion. The Seventh Circuit found that the *Delaware Valley I & II* and *Christiansburg* standard is controlling in this case because there is no identifiable "feature in the language or structure of § 11046(f) [the EPCRA fee-shifting provision] that distinguishes it from the statute [Clean Air Act] in *Delaware Valley*." App. 14a. In so holding, the Seventh Circuit joined the Ninth Circuit in concluding that the attorney's fee-shifting standard should be applied "in the same manner" for both environmental and civil rights laws. App. 15a; *see Morris-Smith v. Moulton Niguel Water Dist.*, Nos. 99-55350, 99-55865, 2000 U.S. App. Lexis 21502 (9th Cir., Aug. 21, 2000); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094-95 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *Washington Wilderness Coalition v. Hecla Mining Co.*, Nos. 97-35565, 97-35754, CV-94-00233-FVS, 1998 WL 515365 (9th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999). The Seventh Circuit then denied the Petitioner's motion for attorney's fees because the Respondent's claim was not frivolous:

> A panel of this court held that CBE [Citizens for a Better Environment] was entitled to proceed. The Solicitor General supported that decision

> before the Supreme Court. A suit strong enough to survive an appeal cannot be deemed frivolous even if all nine Justices thought it unavailing . . . No one suggests that CBE's claim was frivolous on the merits, however, for The Steel Company concededly filed reports after the statutory deadline.

App. 15a.

The balance that Congress and the Court struck with the environmental and civil rights fee-shifting provisions has worked. It protects corporate defendants from frivolous lawsuits while allowing not-for-profit organizations and individuals with limited resources to serve as "private attorneys general" in suing violators as Congress intended. Contrary to Petitioner's rhetoric, the Respondent in this case is not "well-equipped to pursue extensive EPCRA litigation" (Pet. at 6), and the Petitioner does have substantially more financial resources. Petitioner The Steel Company has $31 million in annual sales revenues. Dun & Bradstreet, Inc., U.S. Company Reports, The Steel Co. Business Background Report (2001). Respondent Citizens for a Better Environment has annual revenues of less than $2 million. Altschuler, Melvoin and Glasser, L.L.P., 1999 Independent Auditors' Report for Citizens for a Better Environment.

In addition, Petitioner's repeated contentions that the applicable fee standard has caused an "explosion" in the number of environmental citizen suits is incorrect; in fact, they have steadily declined over the past six years.[1] Petitioner states that "citizen suits brought under EPCRA against

1. *See infra* at 18 and n.4.

non-governmental defendants have resulted in reported decisions in nine cases." Pet. at 25. Only nine court decisions in the fifteen years since EPCRA was enacted in 1986 is barely a "pop," and certainly not an "explosion." Respondent's EPCRA claim was reasonable and not frivolous. Petitioner's attempt to charge its attorney's fees against this grassroots not-for-profit group would chill responsible citizen enforcement of the environmental laws, and it should be denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states that certiorari should be "granted only for compelling reasons" and establishes three basic criteria for reviewing petitions from federal appellate court decisions: (1) whether the decision creates or deepens a conflict among circuits; (2) whether the decision addresses "an important question of federal law that has not been, but should be, settled by this Court;" and (3) whether the decision "conflicts with relevant decisions of this Court." None of these criteria is present in this case, and there are no other "compelling reasons" for granting *certiorari*.

The Seventh Circuit's decision is a straightforward application of settled Supreme Court precedent, and it is completely consistent with the Ninth Circuit's and several district courts' decisions involving the attorney's fee-shifting provisions for citizen enforcement of the Clean Air Act, Clean Water Act, Endangered Species Act and other environmental laws. *See, e.g.*, *Marbled Murrelet*, 182 F.3d at 1094-95 (Endangered Species Act). The attorney's fees provisions in all of these statutes are virtually identical to the language in EPCRA. *Compare* EPCRA, 42 U.S.C. § 11046(f) *with* Clean Air Act, 42 U.S.C. § 7604(d), *and* Clean Water Act,

33 U.S.C. § 1365(d). The legislative history of these environmental laws, as explained below, likewise confirms that Congress intended that the same standards apply to fee-shifting provisions in environmental citizen suits as in civil rights actions.

Petitioner nevertheless asks the Court to ignore the settled law of *Delaware Valley I & II* for environmental cases and limit *Christiansburg* to civil rights cases. Petitioner would instead substitute an approach allowing prevailing defendants to charge attorney's fees when the plaintiff's enforcement claims are unsuccessful, even though not frivolous. This approach draws from the Court's decision on an attorney's fee petition under the Copyright Act in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). Petitioner relies on the same arguments made in the two unsuccessful certiorari petitions from the Ninth Circuit's recent decisions in *Marbled Murrelet* and *Washington Wilderness Coalition*, but still insists that the question of which standard should govern environmental fee-shifting provisions demands the Court's attention. As explained below, it does not:

- There is no split among the circuits on this issue.

- The Court settled the question in *Delaware Valley I & II.*

- *Fogerty* does not compel a different answer. The factors supporting the differential standard in *Christiansburg*, which *Fogerty* found inapplicable to copyright cases, are fully present in environmental cases.

- Petitioner's policy claims lack merit and are more appropriately raised with Congress, rather than before the Court.

Finally, even if the Court were inclined to revisit *Delaware Valley I & II* and *Christiansburg*, this case would be a poor vehicle. Because the Court determined that there was no jurisdiction over Respondent's EPCRA claim, there cannot be jurisdiction to consider Petitioner's motion under EPCRA's attorney's fee provision. Moreover, because Petitioner did not prevail on the merits, but solely on jurisdictional grounds, it is not a "prevailing party" for fee purposes.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS, WHICH AGREE THAT *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG* APPLY TO ENVIRONMENTAL STATUTE FEE-SHIFTING PROVISIONS.

The decision below does not "conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. Rule 10(a). Petitioner admits that the only two courts of appeals to address the question presented – the Seventh Circuit and the Ninth Circuit – agree that the *Delaware Valley I & II* and *Christiansburg* standard governs attorney's fee awards in environmental cases. Pet. at 2-3.

The Seventh Circuit's decision in this case is completely consistent with the Ninth Circuit's decision in *Marbled Murrelet* under the Endangered Species Act. 182 F.3d at 1091. The Ninth Circuit held that because "the Supreme Court indicated [in *Delaware Valley*] that attorney's fees provisions in environmental statutes with similar language and purpose as the attorney's fees provision in the Civil Rights Act should be interpreted in the same way, . . . the *Christiansburg* standard for prevailing defendants applies in this case."

Id. at 1096. The Ninth Circuit reaffirmed its prior holding in *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995), in which it "adopted for RCRA [Resource Conservation and Recovery Act] and the CWA [Clean Water Act] the *Christiansburg* civil rights standard" for determining when defendants can charge attorney's fees. *Marbled Murrelet*, 182 F.3d at 1094; *see also Morris-Smith*, 2000 U.S. App. Lexis 21502 at *5-6; *Washington Wilderness Coalition*, 1998 WL 515365 at *1. Numerous district courts have likewise applied the *Christiansburg* standard to the fee-shifting provisions of environmental statutes. *See, e.g., Atlantic States Legal Found. v. Onodaga Dep't of Drainage*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995) (Clean Water Act); *National Wildlife Fed. v. Consumers Power Co.*, 729 F. Supp. 62, 63-64 (W.D. Mich. 1989) (Clean Water Act); *Consolidated Edison Co. v. Realty Inv. Assoc.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (Clean Air Act).

There is no split among the circuits, and Petitioner candidly acknowledges that the current "situation is likely to continue." Pet. at 4. This prospect of an expanding consensus among the circuits is a reason for denying certiorari, not granting it.

II. THE COURT HAS ALREADY SETTLED THIS ATTORNEY'S FEE ISSUE IN *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG*.

The second relevant criterion in Rule 10 – whether the lower court "has decided an important question of federal law that has not been, but should be, settled by this Court" – is also absent here. Sup. Ct. Rule 10(c). The Court already settled this issue in *Delaware Valley I & II*, which the

Seventh Circuit correctly interpreted as allowing defendants to charge their attorney's fees against citizen suit plaintiffs only if the claims were frivolous. App. 15a. *Delaware Valley I & II* involved the Clean Air Act, but as the Seventh Circuit stated, "[t]he Steel Company has not identified any feature in the language or structure of [EPCRA] § 11046(f) that distinguishes it from the statute [Clean Air Act] in *Delaware Valley*." App. 14a. Petitioners concede that the language in EPCRA "is identical to virtually all other fee-shifting provisions in federal environmental laws." Pet. at 2.

Seeking to escape this settled law, Petitioner insists that the Seventh Circuit, Ninth Circuit and other lower courts have all been "confused" by what it wrongly dismisses as "dictum" in *Delaware Valley I & II*. Pet. at 13. The courts are not the confused parties here.

In *Delaware Valley I*, the Court held that "[g]iven the common purpose of both § 304(d) [the Clean Air Act's fee shifting provision, 42 U.S.C. § 7604(d)] and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." 478 U.S. at 560. The Court supported this conclusion with legislative history indicating that Congress enacted § 304(d) "specifically to encourage 'citizen participation in the enforcement of standards and regulations established under this Act' and 'to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution'." *Id.* (internal citations omitted).

The Court reaffirmed its holding in a follow-up decision, stating that "[l]ast term . . . we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) the

courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988." *Delaware Valley II*, 483 U.S. at 713 n.1. One of the central principles governing fee awards under § 1988 is the *Christiansburg* standard that prevailing plaintiffs may recover attorney's fees, but prevailing defendants may not do so unless a plaintiff's claim was frivolous. That explains why, in *Fogerty*, Justice Thomas recognized that *Delaware Valley* "impose[d] [the] 'dual' standard of recovery" in environmental cases. 510 U.S. at 538. (Thomas J., concurring) (*citing Delaware Valley II*).

Delaware Valley I & II are not "confusing" at all. They state the straightforward legal conclusion that environmental fee-shifting provisions should be applied in the same manner as in § 1988. The Seventh Circuit correctly held that this conclusion "formed the basis of the Court's disposition and therefore cannot be treated as dictum." App. 14a.

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE COURT'S DECISIONS IN *DELAWARE VALLEY I & II, CHRISTIANSBURG* AND *FOGERTY.*

The Seventh Circuit's decision also does not "conflict with relevant decisions of this Court." Sup. Ct. Rule 10(c). *Delaware Valley I & II* are directly on point. Furthermore, even if *Delaware Valley I & II* did not exist, *Christiansburg* would still compel the same standard for attorney's fees in this case, and *Fogerty* would not change that result.

In *Christiansburg*, the prevailing defendant filed a petition under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) ("in its

discretion, [the court] may allow the prevailing party a reasonable attorney's fee"). This civil rights fee-shifting provision closely resembles EPCRA § 11046(f). The Court rejected defendant's argument, also made by Petitioner here (Pet. at 17), that the statute's facial neutrality required use of the same fee-shifting standard for both prevailing plaintiffs and defendants: "the permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction." *Christiansburg*, 434 U.S. at 418.

The Court instead adopted the differential standard allowing plaintiffs to recover their fees as a matter of course, but restricting defendants to charging their attorney's fees against plaintiffs only in cases that are "frivolous" or brought in "bad faith." *Id.* at 418-21. The Court stated that civil rights plaintiffs are "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," and recognized that a plaintiff's fees are awarded "against a violator of federal law." *Id.* at 418 (internal citations omitted). Moreover, the legislative history indicates that the fee provision was meant to facilitate plaintiffs' claims while still protecting defendants from "frivolous suits." *Id.* at 420.

Petitioner insists that *Christiansburg* is not controlling, arguing that the standard adopted by the Court for the fee-shifting provision of the Copyright Act (17 U.S.C. § 505) in *Fogerty* should apply instead. Petitioner's argument is incorrect. *Fogerty* rejected the differential or "dual standard" because "the factors relied upon in our *Christiansburg* opinion . . . are absent in the case of the Copyright Act." 510 U.S. at 523 (footnote omitted). In particular, the Court stressed that "the policies served by the Copyright Act are

more complex [and] more measured" than those of civil rights laws, which principally aim to discourage unlawful discrimination. *Id.* at 526.[2]

In the environmental law context, however, all of the *Christiansburg* factors are present, and they require use of the differential standard here. Regarding the *first* factor, just like the civil rights laws, the environmental laws have a straightforward policy goal: to protect public health and the environment. As *Delaware Valley I* makes clear, the environmental and civil rights laws' fee-shifting provisions have the "nearly identical" and "common purpose" of allowing citizens to serve as "private attorneys general" in enforcing the statutory policies. 478 U.S. at 559-60; *see also Marbled Murrelet*, 182 F.3d at 1095 (noting "similarity in language and purpose between the attorney's fees provisions of the Civil Rights Act and the ESA [Endangered Species Act]").

Petitioner argues that citizens are supposedly not the "chosen instrument" of Congress to enforce environmental laws, and the first *Christiansburg* factor is absent here.

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2. *Fogerty* also emphasized that section 501 was largely imported from the 1909 Copyright Act and thus could not have been modeled on civil rights fee-shifting provisions. 510 U.S. at 524 & n.9 (noting that "Congress, in enacting § 505 of the 1976 Copyright Act could not have been aware of the *Christiansburg* dual standard as *Christiansburg* was not decided until 1978"). By contrast, most environmental fee-shifting provisions were directly or indirectly modeled on their civil rights counterparts. Also, EPCRA § 11046(f) and many other environmental statutes were adopted after *Christiansburg* and even *Delaware Valley I* were decided, and thus Congress had no reason to expect that the differential standard would apply.

Pet. at 22. However, just as with many civil rights statutes, the enforcement regimes of EPCRA and most other environmental statutes involve complementary government action and private citizen suits. Under EPCRA, Respondent was obligated to first file a notice of intent to sue letter with the United States Environmental Protection Agency and the state in which the violation occurred. Although either could have then brought an enforcement action, they instead allowed the citizen enforcement suit to go forward.

Similarly, most civil rights plaintiffs must first file a charge with the Equal Employment Opportunity Commission ("EEOC"), which can prosecute the case on its own, or, instead, allow the private action to go forward. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1); Americans with Disabilities Act, 42 U.S.C. § 12117(a); Age Discrimination in Employment Act, 29 U.S.C. § 626. The EEOC can prosecute civil rights cases even without employee charges or after such private charges are dropped. *See, e.g.*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536 (2d Cir. 1996); *see also General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) ("EEOC is not merely a proxy for victims of discrimination [but is] . . . guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'") (quoting 118 Cong. Rec. 4941 (1972)). Petitioner's argument that "chosen instrument," as used in *Christiansburg*, essentially means "exclusive instrument" is wrong.

Petitioner also quotes *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), out of context, to argue that promoting citizen enforcement is somehow not a primary purpose of citizen suit and fee-shifting provisions. *Ruckelshaus* held that

the Clean Air Act's fee-shifting provision, which on its face has no "prevailing party" requirement, nevertheless requires some success on the merits for a fee award. 463 U.S. at 493-94. At the end of its analysis, the Court noted that § 304(d) can "check the multiplicity of potentially meritless suits," but, in context, that language does not define the principal purpose of environmental fee-shifting provisions. *Id.* at 692-93 (internal quotation omitted). Instead, it simply acknowledges that preventing "meritless" suits was sufficiently important to warrant finding a "prevailing party" requirement in § 304(d). *Id. Ruckelshaus* also quotes legislative materials that define "meritless" to mean "frivolous" or "harassing," thus making it clear that the Court was not suggesting that environmental plaintiffs should pay fees for bringing reasonable, but ultimately unsuccessful, enforcement actions. *Id.* at 692 n.13.

Moreover, *Delaware Valley I* was decided after *Ruckelshaus*. The Court looked to the legislative history of § 304(d) and found that Congress enacted it "specifically to encourage 'citizen participation in the enforcement of standards and regulations established under this Act' and 'to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution'." *Delaware Valley I*, 478 U.S. at 560 (internal citations omitted).

Petitioner ignores the *second Christiansburg* factor: that a prevailing civil rights plaintiff receives its attorney's fees from a defendant that has violated federal law. This likewise applies to plaintiffs filing citizen suits against defendants, such as the Petitioner, that have violated EPCRA or other environmental laws.

Regarding the *third Christiansburg* factor, the legislative history of environmental fee-shifting provisions shows that Congress intended that fees be charged only against those plaintiffs who have brought frivolous or harassing suits. For example, the Senate Report on the Clean Air Act, which provides for fee awards to "any party, whenever the court determines such award is appropriate" (Section 304(d); 42 U.S.C. § 7604(d)), explains that this section allows courts to award fees "to defendants where the litigation was obviously frivolous and harassing. This should . . . discourag[e] abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." S. Rep. No. 1196, 91st Cong., 2d Sess. 38-39 (1970). The legislative history of nearly every subsequent environmental statute reveals the same intent, such as the following Senate Report language on the fee-shifting provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d):

> The provision is not meant to deter citizens from bringing good faith actions to insure the Act is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. Under this section, a defendant can be awarded reasonable fees from the citizen only if he can show that the citizen brought the action in "bad faith." This is similar to other citizen suit provisions involving the award of attorney's fees.

S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977).

Petitioner argues that EPCRA's legislative history provides no similar guidance, but then concedes that the language in EPCRA § 11046(f) is "substantially similar to

language used in fee-shifting provisions included in environmental statutes adopted in the 15 years prior to adoption of EPCRA in 1986." Pet. at 6. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Age Discrimination in Employment Act). Furthermore, Congress passed EPCRA in late 1986 after the Court had already decided *Delaware Valley I*, and nothing in EPCRA's legislative history indicates that this decision should not govern the statute's fee-shifting provision.

All of the three primary factors identified in *Christiansburg* supporting the differential standard are thus present in the environmental context, and nothing in *Fogerty* changes that conclusion. Petitioner then reaches to suggest a new factor: that the typical environmental plaintiff supposedly has substantial financial resources. Pet. at 24-30. First, *Christiansburg* did not rest on the relative disparity of resources between plaintiffs and defendants and, in fact, specifically recognized that civil rights defendants could be impecunious. 434 U.S. at 422 n.20.[3] Second, Petitioner does not and cannot offer any real evidence to support its "Goliath" environmental group rhetoric. Pet. at 24-25, 27. For example, in this case, Respondent Citizens for a Better Environment is a not-for-profit

3. The Court added that the fee-shifting provision at issue gave courts sufficient flexibility to address such inequities in other ways. *Christiansburg*, 434 U.S. at 422 n.20. In addition, a defendant's inability to pay, as well as other equitable issues, can and should be part of any fee-shifting determination. *See, e.g., Adkins v. Briggs & Stratton Corp.*, 159 F.3d 306, 307 (7th Cir. 1998) (considering such factors in awarding fees under the Americans with Disabilities Act).

grassroots organization with under $2 million of annual revenues, and Petitioner The Steel Company has $31 million in annual sales revenues. Respondent is the "David" here, and Petitioner is the "Goliath," not the other way around.

IV. PETITIONER'S UNFOUNDED POLICY ARGUMENTS DO NOT WARRANT GRANTING CERTIORARI.

Even though none of the Rule 10 criteria is present here, Petitioner argues that the Court should still grant review because, as a policy matter, the settled law is supposedly inflicting widespread hardship on the business community, among other things. These policy arguments lack merit and, in any event, are more appropriately directed to Congress.

First, Petitioner repeatedly claims that there is an "explosion" of environmental citizen suits. Pet. at 2, 4, 29. Those claims are undermined by Petitioner's acknowledgment that there have been only nine reported decisions in "citizen suits brought under EPCRA against non-governmental defendants" since the statute was enacted in 1986. Pet. at 25. Nine reported cases in fifteen years amounts to less than one case per year – hardly an "explosion." Statistics compiled by the Administrative Office of the United States Courts show that the number of citizen suits under *all* environmental statutes has steadily and significantly *declined* from 653 in 1994 to 403 in 1999.[4]

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4. In 1994, 653 environmental citizen suits were filed against private corporations, state governments and municipalities; the statistics do not break out the lesser number of suits filed against private corporations. The combined number of suits fell to 623 in 1995, 616 in 1996, 469 in 1997, 427 in 1998 and 403 in 1999. (Cont'd)

Second, Petitioner argues that the differential standard somehow gives plaintiffs an incentive to bring dubious and harassing suits, while its preferred approach would not unduly chill citizen enforcement. Pet. at 26-30. Not so. As Petitioner acknowledges, environmental plaintiffs, unlike civil rights plaintiffs, generally cannot obtain damage awards, and any civil fines are paid to the federal treasury. Pet. at 23. Environmental plaintiffs must compensate their own attorneys and incur other costs every time they bring a citizen suit, as attorney's fees are only available if they prevail. Therefore, environmental plaintiffs have a strong incentive to avoid weak lawsuits, and *Christiansburg* already provides a safeguard against frivolous claims. If environmental plaintiffs were forced to pay defendants' attorney's fees in reasonable, though ultimately unsuccessful, cases, it certainly would deter citizen suits, and Congress' goal of encouraging private attorneys general to bring enforcement actions would be undermined.

Finally, Petitioner's claim that environmental groups have unfair leverage and extract "tribute" from companies by forcing them to generously settle meritless claims is colorful, but incorrect. Pet. at 11, 29-30. If the lawsuit so lacks merit that it is "frivolous," then a plaintiff has no leverage. Nor can environmental group plaintiffs threaten defendants with the prospect of jury awards and punitive damages. Citizen suits cannot result in a civil fine larger than what a federal judge is willing to impose, and companies will likely settle only if they believe that doing so is preferable to paying the civil penalty warranted by their

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(Cont'd)
See Judicial Business of the United States Courts, at *www.uscourts.gov/news.html*. The statistics for 1994-1996 are obtained from the Administrative Office of the United States Courts.

violations. In any event, all civil defendants can claim that their inability to recover attorney's fees under the ordinary "American Rule" creates settlement pressure, even in cases they might consider to be winnable.

V. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEWING THE QUESTIONS PRESENTED BECAUSE THERE IS NO SUBJECT MATTER JURISDICTION.

Even if review of this petition were warranted under Rule 10, this case would still be the wrong vehicle because there is no subject matter jurisdiction to consider Petitioner's fee motion. The Court previously held that because Respondent lacked standing to bring its EPCRA claim, "we and the lower courts lack jurisdiction to entertain it." *Steel Co.*, 523 U.S. at 110. The district court consequently denied Petitioner's fee motion, finding that without jurisdiction over any substantive EPCRA claim, it had no jurisdiction to apply EPCRA's fee-shifting provision. App. at 23a. ("the fact that EPCRA authorizes courts the discretion to award attorney's fees does not, by itself, constitute an independent grant of jurisdiction"). The Seventh Circuit disagreed and reasoned that because "[c]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to another," the lack of jurisdiction over Respondent's EPCRA claim did not eliminate jurisdiction over Petitioner's EPCRA fee motion. App. at 3a (internal citations omitted). Although this quoted rule may be generally true, it does not apply here.

Federal courts have no subject matter jurisdiction over a claim or issue unless such jurisdiction is consistent with the Constitution *and* authorized by Congress. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

Jurisdiction over Petitioner's fee motion, however, is not "authorized by Congress" because EPCRA § 11046(f) does not independently confer subject matter jurisdiction; instead, it depends on a cognizable case "brought under" the statute's substantive provisions. 42 U.S.C. § 11046(f); *see also W.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994) ("fee-shifting provisions cannot themselves confer subject matter jurisdiction"). Because the Court has already ruled that there is no cognizable EPCRA case here, there is no jurisdiction to apply that statute's fee-shifting provision. *Steel Co.*, 523 U.S. 110.[5]

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5. This EPCRA case is distinct from non-substantive statutes in which Congress specifically conferred jurisdiction to award fees and costs despite the lack of jurisdiction over an underlying claim. *See, e.g.*, 28 U.S.C. § 1919 (court "may order payment of just costs" upon dismissal for lack of subject matter jurisdiction); 28 U.S.C. § 1447(c) (court may order payment of fees and costs after wrongful removal). Such fee awards are collateral to the merits and serve primarily to protect the judicial system, not to reward victorious litigants. The same is true for Federal Rule of Civil Procedure 11 sanctions, which is why the Court held that fees can be imposed under Rule 11 without subject matter jurisdiction over the underlying case. *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992).

The Seventh Circuit relied upon *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), to find jurisdiction, but that case is irrelevant. *Charles* affirmed an award under § 1988 for the fees that plaintiff incurred in defending an appeal that was dismissed for lack of jurisdiction. The district court had jurisdiction to award those fees because it had jurisdiction over plaintiff's underlying § 1983 claim. In this case, the problem is not that Petitioner seeks fees incurred in a *phase* of the proceedings over which a court lacked jurisdiction. Instead, there is no jurisdiction because Petitioner is seeking fees pursuant to a statute under which the Court has already determined in *Steel Co.* that no claim exists, and no court has the power to apply in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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